Office-Supreme Court, U.S.
FILED
MAY 24 1963
JAMES R. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 155

JOHN ODDO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	4
Statement of the Case	4
1. Introductory	4
2. The Alleged Pre-naturalization Arrests	6
3. The Proofs of the Alleged Concealments	11
4. Rulings and Decisions of the Courts Below	14
Reasons for Granting the Writ	17
Conclusion	29
Appendix A—Opinion of United States Court of Appeals	1a
Appendix B—Opinion of United States District Court	11a
Appendix C—Findings of Fact and Conclusions of Law	16a
Appendix D—Decree	18a
Appendix E—Judgment of United States Court of Appeals, Second Circuit	20a

Authorities Cited

Cases

	PAGE
Application of Barnes, 219 F. 2d 137 (C.A. 2 1955), reversing In re Oddo, 117 F. Supp. 323 (E.D.N.Y., 1953)	27
Chaunt v. United States, 270 F. 2d 179 (C.A. 9), reversed on other grounds, 364 U. S. 350	2, 17, 18, 19, 20, 21, 23
Costello v. United States, 365 U. S. 265	3, 17, 27, 28
Cufari v. United States, 217 F. 2d 404 (C.A. 1 1954)	20, 21, 22, 23, 25, 26
Hawkins v. Kuhne, 153 App. Div. 216, 137 N. Y. S. 1090 (2d Dept. 1912), affirmed 208 N. Y. 555	18
Klig v. United States, 296 F. 2d 343 (C.A. 2 1961)	18
People v. Belcher, 302 N. Y. 529 (1951)	18
People v. Bertram, 302 N. Y. 526 (1951)	18
People v. Crane, 94 App. Div. 397, 88 N. Y. S. 343 (1st Dept. 1909)	18
People v. Flynn, 64 Misc. 278, 118 N. Y. S. 532 (S. Ct. N. Y. Co., 1909)	18
People v. Marendi, 213 N. Y. 601 (1915)	18, 19
People v. O'Connor, 257 N. Y. 473 (1931)	18
Schneiderman v. United States, 320 U. S. 118	17
Stacher v. United States, 258 F. 2d 112 (C.A. 9 1958)	21
United States v. De Lucia, 256 F. 2d 487 (C.A. 7 1958)	22
United States v. Failla, 164 F. Supp. 307 (D. N.J. 1958)	21
United States v. Galato, 171 F. Supp. 169 (M.D. Pa. 1959)	21
United States v. Kessler, 213 F. 2d 53 (C.A. 3 1954)	18, 19, 23

PAGE

United States v. Meli, 158 F. Supp. 217 (E.D. Mich. 1957), affirmed 265 F. 2d 222 (C.A. 6 1959) 21, 22
United States v. Minerich, 250 F. 2d 721 (C.A. 7 1957) 22
United States v. Minker, 350 U. S. 179 27
United States v. Montalbano, 236 F. 2d 757 (C.A. 3 1956), affirming United States v. Genovese, 133 F. Supp. 820 (D. N.J. 1955) 22
United States v. Profaci, 274 F. 2d 289 (C.A. 2 1960) 21
United States v. Rossi, 299 F. 2d 650 (C.A. 9 1962) .. 18

Statutes

8 U. S. C. §1451(a) 2, 4, 19
28 U.S.C. §1254(1) 2
28 U.S.C. §2101(c) 2
Code of Federal Regulations (1938), Title 8, §70.7 24

Miscellaneous

Gellhorn, Administrative Law, Cases and Comments (2d Ed.), pp. 136 et seq. 25
Wigmore on Evidence (3rd Ed.), §2572, at fn. 16 25

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, John Oddo prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered February 26, 1963.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, printed in Appendix "A" hereto, *infra*, is reported at 314 F. 2d 115. The opinion of the United States District Court for the Eastern District of New York, printed in Appendix "B" hereto, *infra*, is reported at 202 F. Supp. 899. The Findings of Fact and Conclusions of Law of the District Court (unreported) are printed in Appendix "C" hereto, *infra*.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered February 26, 1963 (Ap-

pendix "E", *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1); and under 28 U.S.C. 2101(c), in that the judgment herein sought to be reviewed on certiorari was rendered "in a civil action, suit or proceeding", to wit, a proceeding pursuant to 8 U.S.C. §1451(a) "for the purpose of revoking and setting aside the order admitting" the petitioner herein "to citizenship and cancelling the certificate of naturalization * * *".

Questions Presented

1. In the overall circumstances of this case, where the citizen whose naturalization has been revoked on grounds of "fraud", originally entered the country as a four-year old child brought here by his parents, where the naturalization certificate that has been revoked was granted more than thirty years ago, where the Government waited a quarter of a century before moving to revoke that certificate, and where the alleged fraudulent concealment on which the revocation is based relates at worst to uncontradictedly illegal, sham and trivial "arrests", is it within the fair and equitable intent of the statute, and does it accord with due process of law, to decree such revocation?

2. Do the rulings of both Courts below, to the effect that the Government in this case met its exceptionally heavy burden of proof for denaturalization, call for corrective intercession by this Court to prevent corrosion of the principle of *Chaunt* v. *United States*, 364 U. S. 350, that concealment of arrests in denaturalization proceedings is not *ipso facto* disqualifying but that "the totality of the circumstances surrounding the offenses charged" should be taken into account?

3. Where the Government's denaturalization complaint and supporting affidavit framed the factual issue of alleged

concealment of arrest as depending upon proof of such concealment in certain specific oral interviews under oath more than thirty years ago, was it error and was it inconsistent with the law in other Federal Circuits for the Court below to rule that (1) evidence of "custom and practice" is probative of the alleged concealment in those long-ago oral interviews with Immigration Examiners who have long since died; and (2) that *unsworn* documents assertedly used or referred to in those oral interviews are independently probative of the alleged concealment solely on the basis of such "proof" of custom and practice? Do not these rulings call for a guiding pronouncement from this Court, which has never passed upon the aforesaid issues of "custom and practice" in denaturalization proceedings?

4. Did the Court below so disorient and misapply this Court's important innovational suggestion in *Costello v. United States*, 365 U. S. 265, on the question of the availability of the defense of laches in denaturalization proceedings, as to call for the intercession of this Court to protect the sound development of the *Costello* innovation during its formative period of application by the lower Federal Courts, where, as the record here shows, the Government admittedly knew of petitioner John Oddo's allegedly unfavorable reputation at least as early as 1952, where one of the Immigration Examiners who was supposedly in a position to give direct testimony as to the happenings in the oral interviews of 1931 remained alive until after the middle of 1953, and where this denaturalization proceeding was not commenced until June 21, 1957?

Statute Involved

8 U.S.C. § 1451(a) provides in pertinent part:

> "It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively. * * * "

Statement of the Case

1. *Introductory*

This denaturalization proceeding was brought in 1957 to set aside an order of the United States District Court for the Eastern District of New York, entered December 1, 1931, admitting the petitioner John Oddo to United States citizenship (174a-181a*). The denaturalization statute (8 U.S.C. §1451(a), quoted *supra*) applies to cases where it is charged that naturalization was "procured by concealment of a material fact or by willful misrepresentation". The alleged concealment in the instant case concerns alleged arrests preceding the naturalization in 1931.

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* "a" refers to the "Appendix to Appellant's Brief in the Court below, nine extra copies of which are filed herewith.

The petitioner, John Oddo, was brought to the United States in 1907 from Italy when he was a child four years of age (Govt's Ex's 1, 4, 5)*. He filed a Declaration of Intention in 1926, seeking citizenship (Govt's Ex. 2). His oral examination by the Immigration and Naturalization Service occurred on August 3, 1931 (Govt's Ex. 4; 153a-155a, 161a). The date of the order of his naturalization is December 1, 1931 (174a).

As we demonstrate *infra* the above mentioned date of petitioner's oral examination on his application for citizenship—August 3, 1931—is (or should be) *the* operative date in this case, and the alleged happenings in that oral examination on that date are (or should be) *the* operative happenings, because the alleged concealment or misrepresentation by the petitioner concerning alleged arrests preceding his naturalization in 1931 are said to have occurred in oral statements allegedly made by the petitioner, under oath, on a specific single day more than thirty years ago—the previously mentioned operative date of August 3, 1931—to two Examiners of the Immigration and Naturalization Service, both of whom are deceased and did not testify in this case (*infra*).

It is noteworthy that (see details *infra*), except for "convictions" for traffic offenses and one or two boyhood pranks ("disorderly conduct"), and a single conviction of crime (usury) (this last having post-dated his naturalization in 1931), the petitioner has no "criminal record" in any fair or meaningful sense—and this, despite the fact that he is one of that ill-favored section of our metropolitan population in the New York area who seem, all their lives, to be

* No exhibits were printed in the "Appendix to Appellant's Brief" in the Court below. All of the exhibits—which are exclusively documentary—will be filed by petitioner with the Clerk of this Court promptly after the Government shall signify to us that it no longer needs them in preparing its response to this petition.

the persistent objects of the attention of local police and are therefore being repeatedly "picked up", giving rise to an impressive-seeming but actually altogether misleading "arrest record".

The Trial Court in this case entered its decree on April 9, 1962 (Appendix "D" hereto, *infra*), depriving the petitioner of his 1931 naturalization (192a); the transcript of the entire trial proceedings—except for Exhibits, as mentioned in our last preceding footnote—is printed in the "Appendix to Appellant's Brief" (nine extra copies filed herewith). The United States Court of Appeals for the Second Circuit affirmed the denaturalization decree (Appendices "A" and "E" hereto, *infra*).

2. *The Alleged Pre-naturalization Arrests*

The Government at the trial herein introduced Exhibits and testimony concerning the following alleged arrests preceding the petitioner's naturalization in 1931:

In May, 1919, "John Oddo", age 16, was convicted of "disorderly conduct" and paid a fine of $2.00 (Govt's Ex. 8D). This apparently involved an incident of "throwing stones in the street", and the Exhibit in question appears never even to have been connected with the petitioner at the trial (16a-25a).

On June 2, 1927, "John Oddo" was arrested on a charge of burglary and was discharged by a magistrate two days later. Government's Exhibits 8, 9 and 11 show that the sole basis for this arrest was that the "John Oddo" arrested had been seen standing on a streetcorner opposite to the premises where a burglary of auto tires occurred. Morris Goon, a retired New York City policeman, testified that he arrested a "John Oddo" for burglary before 1931, but he had no independent recollection thereof even after reading

his memorandum pad (97a-99a). The Court nevertheless admitted the memorandum pad in evidence over defense objection (Exs. 15, 99a). Coon further testified that he signed the Exhibit 11 "short affidavit" for this burglary arrest (99a). He admitted that his "affidavit" was based solely on information and belief and that he had no independent knowledge of the alleged crime. He supplied no other details as to the true cause or justification of this arrest (99a-102a). The defense moved to strike Coon's entire testimony on the ground that he did not identify the defendant in any way as being the same "John Oddo" involved in the 1927 burglary arrest. The motion was denied (103a, 170a-171a, 189a).

In March, 1928, a "John Oddo" was arrested, and the same day discharged, on a charge of "disorderly conduct", *viz.*, "using loud and boisterous language, crap game" (Govt's Ex. 9A).

(The Court will please note that in each instance in which we do not herein recite any proof as to identification by the Government of the "John Oddo" involved in the alleged arrests, it is because there was no such proof in this trial.)

In August, 1929, a "John Oddo" was fined $1.00 for "disorderly conduct", *viz.*, of "loud boisterous language" (Govt's Exs. 8A, 9B).

One of the most tendentious of the alleged "arrests" adduced by the Government in this case was the arrest in July, 1930, of a "John Oddo" on a charge of homicide by shooting (Govt's Exs. 8B, 9C, 10B, 11A, 16). James B. McIvor, a New York City Police detective, testified that he arrested a "John Oddo" for homicide on July 28, 1930 (80a-81a), that he had no independent recollection of this but was testifying purely from records (80a-86a), and

that he could not identify the defendant in court (85a-86a, 88a-89a). The records did not show that Mr. McIvor actually participated in the above arrest (89a-92a). The defense moved to strike the entire McIvor testimony, after the witness said (notwithstanding his prior assertions of total non-recollection) that he would never forget the "John Oddo" of 1930 (94a-96a—motion denied). It is important to note that there is no proof in this record that the "John Oddo" whose physical appearance of 1930 McIvor suddenly remembered corresponded to the then appearance of the petitioner herein. The Government's Exhibits concerning this supposed homicide arrest (8B, 9C, 10B, 11A, 16) reveal that the "John Oddo" so arrested was discharged within a few days after the arrest for lack of identification of the supposed culprit, which is of utmost significance because identification witnesses were not lacking at all, i.e., there were one direct eye witness to the shooting and two eye witnesses to the flight from the shooting scene of the two unapprehended men who had actually done the shooting. It appeared also from these Exhibits that the reason why "John Oddo" had been arrested at all for this shooting was that the killers had fled in an automobile registered in "John Oddo's" name—scarcely the provident conduct that one would expect from a man involved in planning his "getaway" from a shooting.

In February, 1931, a "John Oddo" was arrested, and acquitted, on a charge of "vagrancy" (Govt's Ex's 8E, 9F, 10). This alleged arrest of the person who is asserted to be the petitioner John Oddo herein is perhaps the single most fantastic episode in the so-called pre-naturalization arrest picture in this case, for the Governments Exhibits just cited show that what actually happened was that the "John Oddo" involved had himself been the victim of a

shooting by two unknown men in an automobile while said victim was standing on the street apparently in the presence or in the immediate vicinity of several policemen. The "vagrancy" arrest was listed by the police as being grounded on the victim's being "a known criminal" and "no visible means of support". The "vagrancy" charge came to naught when "John Oddo" was acquitted shortly after the arrest as above indicated. The Government in connection with this 1931 incident made a great show of the testimony of Louis White, a New York City Police Officer. Mr. White testified that he knew a "John Oddo" between 1926 and about 1936 (43a-44a), identified the instant petitioner in court (44a) and a 1939 photograph of him (Exs. 13, 44a-45a), and also a 1952 photograph (46a). He testified that he arrested a "John Oddo" for vagrancy *some time prior to 1931*—note Mr. White's inaccuracy as to the date of the *1931* incident in question—under circumstances showing that the person arrested had in fact been the victim of an assault (47a-51a, 52a-54a, 56a). We think it will not be disputed that Mr. White's testimony and the Exhibits above cited establish that this 1930 arrest was not made on probable cause, and that "John Oddo" was subjected to that arrest purely as a police investigative "shot in the dark" operation in search of suspects.

In August, 1931 a "John Oddo" was arrested for "assault and robbery," the charge being dismissed two days later apparently because the victim and complaining witness absolved "John Oddo" (Govt's Exs. 8C, 9D, 10A, 11B). This arrest arose out of a holdup of a milk company collector by two unknown men, and it is obvious from the Exhibits just cited that "John Oddo" was picked up by the police for this crime simply as part of a random dragnet operation. The previously mentioned police officer Louis White testified that he had made this arrest, under circum-

stances showing that the victim of the alleged crime had described his assailants in a way that could not support even a suspicion of the "John Oddo" arrested (54a-73a). Here again, then, we have another of those "arrests" which was manifestly not made on probable cause but purely as a police "shot in the dark" operation.

In October, 1931, a "John Oddo" was arrested by a detective Black on a charge of violation of "722 Penal Law (1 (illegal occupation)" and was discharged shortly thereafter (Govt's Exs. 9E, 10C). The latter Exhibit indicates that "John Oddo" and two other persons were arrested as "being in some illegal occupation and bearing an evil reputation". Detective Black testified at this trial (76a-79a), and he shed no further light on the circumstances of justification for this arrest.

John J. Hogan, a City of New York correction officer, produced Exhibit 16, a 1930 Magistrates' Court document bearing a signature of "John Oddo" (103a-108a). Erastus Severance, a New York City detective and fingerprint witness produced exhibits as to fingerprint identification, some of which bore "John Oddo" signatures (Exs. 17 to 21E inclusive, 108a-126a). Lyndon L. Shaneyfeld, an F.B.I. document examiner and handwriting expert, testified that the within petitioner's signature on the basic naturalization exhibits of 1930-1931 was the same as the "John Oddo" signatures on the documents produced by witnesses Hogan and Severance (134a-137a). He also testified, on cross examination, that the entries answering questions on the petitioner's "Preliminary Form" for naturalization (Ex. 5) could not be identified as having been made in the petitioner's handwriting, and that they appeared to have been written by different persons using different writing instruments (137a-139a).

3. *The Proofs of the Alleged Concealments*

The affidavit annexed to the Government's complaint (178a) charges that the alleged falsity occurred "under oath" (this can refer only to the alleged oral statements to the now deceased Examiners, for reasons noted below); and see the opening statement of Assistant United States Attorney Galardi in this trial (7a), expressly declaring that the alleged concealments occurred "commencing on August 3, 1931", which Mr. Galardi went on to state was the date of the oral examination.

We emphasize these facts as to the specifically limited bounds of the Government's case because it follows from these facts that the Government cannot rely on the "Preliminary Form For Petition For Citizenship" (Ex. 5), or on the triplicate copy of the "Petition" for naturalization (Ex. 4) which bears certain pencilled notations by the Examiners, as *independent proof* of the alleged *oath-violative* concealments: (1) The "Preliminary Form" is dated *October 30, 1930* (i.e., prior to the operative date of *August 3, 1931*), it is not signed under oath, and, also important, it is not deemed a part of the signed original of the "Petition For Citizenship" (Ex. 3), for the latter document (dated August 3, 1931) specifies just which other documents are deemed a part thereof ("Attached hereto and made a part of this, my petition for citizenship, are my declaration of intention to become a citizen of the United States, certificate from the Department of Labor of my said arrival, and the affidavits of the two verifying witnesses required by law."—See also clerk's certificate to the same effect at the bottom of the "Petition" form). It further follows, then, that the entry "no" in answer to question 29 on the "Preliminary Form", relating to arrests, is not a probative part of the Government's case in this proceeding inde-

pendently of the supposed evidence as to what transpired at the oral examination on August 3, 1931. (2) Nor did the above mentioned triplicate copy of the "Petition" (Ex. 4) constitute any such independently probative evidence because the only matter adduced by the Government from that triplicate copy consisted of pencilled notations thereon which were said to have been made by an Immigration Examiner who had died long before this trial (*infra*).

The Government's case thus had to stand or fall (we maintained below and do here) on the "proofs" as to what took place at the oral examination of August 3, 1931. Those "proofs", consisting solely of the testimony of one Louis M. Dillon as to "custom and practice", will now be described:

Mr. Dillon testified as an employee of the Immigration and Naturalization Service (139a *et seq.*) It was confirmed during Mr. Dillon's testimony that the two Immigration Examiners who the Government claims interviewed the within petitioner on August 3, 1931 are both deceased; Examiner Moore died March 9, 1935, Examiner Hardy (or Hardie) July 1, 1953 (140a-141a; Exs. 23, 24). Mr. Dillon had no independent knowledge whatsoever of what took place in that examination in 1931 (163a). He testified solely as to "custom and practice", to which the defense vigorously and repeatedly objected on the ground of lack of competency (140a, 141a; 144a, 147a).

As to the allegedly oath-violative concealments by the within petitioner in the oral interview with Immigration Examiner Hardy on August 3, 1931, Mr. Dillon was permitted to testify that it was the custom and practice for Examiners at that time orally to take the applicant down the list of the questions which the applicant had previously answered in writing on the Preliminary Form (unsworn,

it will be recalled) and that this would have included orally checking with the applicant (who was now under oath) his answer to question No. "29" on that Form ("Have you ever been arrested or charged with violation of any law of the United States, or any State, or any city ordinance or traffic regulation?"); that the Examiner would make check marks on the Preliminary Form to show that the written answers on that Form had been confirmed by the applicant (the Preliminary Form herein bore the written answer "no" for the "arrest" question No. 29); and that the Examiner would put his initials on the Preliminary Form and on the triplicate copy of the Petition for Naturalization (which latter was typed up during the same interview) (139a-156a; 164a-165a).

Similarly, Mr. Dillon was permitted to testify about what would have been the custom and practice during the interview of the applicant by a second or "Designated Examiner" in the interview on the same 1931 day, Mr. Dillon saying that pencilled notations on the reverse side of the triplicate copy of the Petition for Naturalization (Ex. 4) indicated that Examiner James Moore questioned the applicant as to prior arrests and received the answer "no" (153a-155a).

Especially significant in Mr. Dillon's testimony is the passage at pages 147a-148a where the Government asked him whether he was "able to form an opinion as to whether this custom and practice that you have just described was in fact carried out at the time of the preliminary examination relating to this particular application and preliminary form", and then withdrew the question even though the Trial Court had overruled a defense objection thereto, the Government stating that it would let the document "speak for itself". As we have earlier pointed out, however, this document (the "Preliminary Form", Ex. 5) cannot "speak

for itself", because it does not form a part of the sworn formal papers constituting the actual Petition for Naturalization (Ex. 3). The same is true, again, of the triplicate copy of the Petition for Naturalization, which was not said even by the Government itself to be probative of anything except pencilled notations by the now-deceased Examiner Moore— i.e., said triplicate copy is not independent proof of the within petitioner's violation of an oath.

Also significant in Mr. Dillon's testimony is his statement that, under the custom and practice in 1931, the last time that the applicant for naturalization would have been asked about arrests was in the oral examination procedure, which in this case took place on August 3, 1931 in the questioning by the now deceased Examiners; and that there would have been no examination on this subject before the Court which entertained the citizenship application (161a-163a). Mr. Dillon also described the very heavy work load for the examination of applicants in the Brooklyn office in 1931 (161a-162a)—evincing all the more pronouncedly the insubstantiality of the Government's "proof" that the within petitioner was actually asked in 1931 about arrests in his oral examination.

During the Dillon testimony the defense also objected to the Government's attempting to make its case as to "concealment" without the testimony of living witnesses, on the ground of laches (141a-142a, 170a).

A. Rulings and Decisions of the Courts Below

The Trial Court denied all motions of the defense for the striking of testimony and exhibits (170a-172a, 189a). *It blocked off the defense from exploring the issue of probable cause of legality of the arrests* (69a-72a, 159a). It also rejected the defense of laches (189a, 191a).

Rejecting the defense contentions that the "Preliminary Form" (Ex. 5) and the triplicate copy of the "Petition" (Ex. 4) had no independent probative force in this case (apart from the testimony of "custom and practice" which the defense unavailingly objected to as incompetent), the Trial Court found, as one of *four* distinct concealment incidents, that the within petitioner "falsely denied and concealed his record of prior arrests * * * during the naturalization proceeding * * * when he completed" the Preliminary Form (190a).

Similarly, ignoring the plain testimony of the Government's own witness, Dillon that as a matter of "custom and practice" there would have been no examination on the subject of arrests before the Court which entertained the citizenship application in 1931 (161a-163a), the Trial Court found as still another of the four distinct concealment incidents that the within petitioner so concealed his record of prior arrests "when he appeared before this Court on December 1, 1931" (190a).

The Trial Court also found that the within petitioner had committed such concealments when examined by the two 1931 Examiners who, again, did not testify at this trial because they were deceased; by this finding, then, the Trial Court signified its acceptance of the Dillon testimony of "custom and practice" (190a).

Despite the previously described condition of the proofs as to the absolute legal baselessness of virtually all of the alleged arrests, the Trial Court found, as being operative against the within petitioner for the purposes of denaturalization, that "The arrests concealed by him included the following:

"Violation of 722:11 of the Penal Law in October 1931

Assault and Robbery with a gun in August 1931.
Vagrancy in January 1931
Homicide in July 1930
Burglary in June 1927
Vagrancy in April 1923" (190a-191a).

The Court of Appeals for the Second Circuit, in affirming the decree of denaturalization, concluded "that the Government adequately met its demanding burden of proof" (Appendix hereto, *infra*, p. 3a). Making no mention at all of our contention that this issue as to proof of the fact of concealment had been specifically and unalterably framed by the Government's own complaint and supporting affidavit as being the issue of whether Oddo had violated an *oath*—which in turn meant that the Government had undertaken to prove such oath-violation in the oral interview of August 3, 1931—making no mention, we say, of this issue-framework in the case, the Court below treated, as primary in the Government's "proofs", not the Dillon testimony of "custom and practice" (which was the only "independent" "proof" of what occurred on August 3, 1931), but instead what it so treated as primary was one of the non-oath documents previously described (the Preliminary Form (Ex. 5)). The Court below reasoned (Appendix hereto, *infra*, pp. 4a-5a) that Oddo's act of signing his name to this Preliminary Form on which he denied having any prior arrests "constituted concealment"; and that the testimony of Dillon as to "custom and practice" had been used by the Government merely, as it were, "to strengthen its case on the issue of concealment", the Court deeming such testimony "admissible as circumstantial evidence".

The Court below also rejected our contentions that the circumstances of the alleged arrests—i.e., the manifest ille-

gality (and prompt abortiveness) of all of the more serious arrests, and the triviality of the others—rendered them not significant in point of "materiality" for the purposes of a denaturalization proceeding (*id.*, pp. 6a-8a).

The Court below (seemingly) entertained our contention of *laches*, but concluded that prejudice to the within petitioner by reason of *laches* was speculative (*id.* 8a-10a).

Reasons for Granting the Writ

In deciding that the Government in this case had met its "heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship" (*Costello* v. *United States*, 365 U. S. 265, 269) by "clear, unequivocal and convincing evidence" not leaving "* * * the issue in doubt" (*Schneiderman* v. *United States*, 320 U. S. 118, 125, 158; *Chaunt* v. *United States*, 364 U. S. 350, 353), the Court below has decided important Federal questions in a way in conflict with applicable decisions of this Court, and it has rendered a decision in conflict with the decisions of other Courts of Appeals on the same matter. Also, in its rulings as to the probativeness of the unsworn "Preliminary Form" plus the testimony of "custom and practice", the Court below has decided an important question of the Federal law of naturalization which has not been, but should be, settled by this Court—and which likewise presents a conflict among Circuits.

1. *Chaunt* v. *United States*, 364 U. S. 350, this Court endorsed clearly for the first time the rule that concealment of arrests in de-naturalization proceedings is not *ipso facto* disqualifying, but that in view of the extraordinarily heavy burden of proof upon the Government in such proceedings and because "the issue in these cases is so important to the liberty of the citizen", "the totality of the circumstances surrounding the offenses charged" should be taken into account.

This beneficent innovation which the Court made in *Chaunt* has been followed in the Ninth Circuit (cf. *United States* v. *Rossi*, 299 F. 2d 650 (C.A. 9 1962)), and indeed in a case in the Second Circuit preceding the instant one (cf. *Klig* v. *United States*, 296 F. 2d 343 (C.A. 2 1961)).

As shown in our recital of the facts, *supra*, the only arrests here involved for which the testimony brought out any background circumstances as to their cause or justification were either (1) of a trivial nature, or were (2) manifestly nothing more than arbitrary actions by the police to pick up "John Oddo" as part of a dragnet type of police operation and to hold him on "short affidavits" on the purely speculative possibility that something might turn up against him.

It is beyond dispute that under the law of New York such latter second category of arrests were absolutely illegal, null and void, and indeed would have justified actions for false arrest and false imprisonment. See *People* v. *Marendi*, 213 N. Y. 601, 608-610 (1915); *People* v. *Belcher*, 302 N. Y. 529 (1951); *People* v. *Bertram*, 302 N. Y. 526 (1951); *People* v. *O'Connor*, 257 N. Y. 473 (1931); *Hawkins* v. *Kuhne*, 153 App. Div. 216, 137 N. Y. S. 1090 (2d Dept. 1912), affirmed 208 N. Y. 555 (see "second cause of action"); *People* v. *Crane*, 94 App. Div. 397, 88 N. Y. S. 343 (1st Dept. 1909); *People* v. *Flynn*, 64 Misc. 278, 118 N. Y. S. 532 (S. Ct. N. Y. Co. 1909—decision by Judge Irving Lehman).

As to all of the other arrests on which the Government relies in this case, the record is wholly devoid of any showing as to their justification.

In this posture of the record, we invoked in both Courts below the principle announced in *United States* v. *Kessler*, 213 F. 2d 53 (C.A. 3, 1954), an *en banc* decision, with one

Judge dissenting, wherein it is laid down in broad doctrinal terms that the duty of an applicant for naturalization to disclose arrests does not extend to "false arrests". (In *Kessler* the Government did not even attempt to get certiorari.) While the facts in *Kessler* are admittedly distinguishable from ours in that *Kessler* involved arrests for peaceful picketing (which the Court found were illegal arrests because they were not for any offense proscribed by law), the reasoning and language of the Court do not limit the rule of the decision to only that category of "false arrests".

(It will be noted that the *Kessler* opinion (213 F. 2d at 56, fn. 5), expressly refers to the New York law of arrest as stated in *People* v. *Marendi*, cited *supra*.)

It is submitted that the Government's failure to establish that the alleged arrests in this case were not illegal or "false arrests", constitutes a failure to prove that the defendant's certificate of naturalization was "procured by concealment of a material fact" (8 U.S.C. 1451(a)). And for that reason alone this Court, in the spirit of the *Chaunt* case, should intercede to prevent a trade injustice to an individual citizen. But even if the case cannot be put that strongly, the situation still calls for intercession by this Court under the *Chaunt* case for the following reasons. The Government's own proofs in this case did not depict "the totality of the circumstances" of the defendant's alleged arrests, except in those instances earlier mentioned where the utterly sham and illegal nature of the arrests did emerge from cross-examination of the Government's witnesses or from the Government's own exhibits. And the Trial Court's ruling heretofore noted (68a-72a, 156a) prevented the defense from pursuing further the inquiry into "the totality of the circumstances". Had the defense been permitted to explore this area, the present record might

well have depicted, in its "totality", an arrest history "of extremely slight consequence" (*Chaunt* v. *United States*, 364 U. S. at 354) by reason of the indicated New York Police pattern of arbitrary and overly-ready "arrests" on mere suspicion and speculation.

2. On the issue of the probativeness of the "Preliminary Form" and of the testimony of "custom and practice"—"proof" which we urge was utterly insufficient on the present record to support the decreeing of the drastic judicial sanction against the petitioner John Oddo which the Government has sought and obtained in this proceeding—the Court below concluded that this case is distinguishable from *Cufari* v. *United States*, 217 F. 2d 404 (C.A. 1 1954). We maintain that *Cufari* is virtually on all fours with the instant case; and that thereby a conflict of Circuits arises. There is only one insignificant point of difference between *Cufari* and this case—*Cufari* involved a naturalization in 1927, which was prior to the use of the printed "Preliminary Form" with its "arrest" question (= 29). This point of difference is of no moment in view of the comprehensive policy-rule laid down by the *Cufari* decision, discountenancing evidence of custom and practice of the sort which was found by the Court below in our case to satisfy the Government's "demanding burden of proof" (Appendix hereto, *infra*, p. 3a). The closeness of the *Cufari* facts to ours is remarkable. Here, as in *Cufari*, the original examining officers were deceased; the Government's case as to the alleged concealment rested solely on the testimony as to custom and practice plus a documentary entry of no arrests; and the Court concluded that even though the Government's proof "no doubt . . . is enough to establish by the balance of the probabilities that Cufari was asked if he had ever been arrested and answered that he had not", nevertheless those proofs were insufficient to establish

that the Government had made its case "by clear, unequivocal and convincing evidence which does not leave the issue in doubt".

Indeed, in important respects our case is stronger than *Cufari*. The testimony in *Cufari* as to "custom and practice" included a specific assertion that it was the practice of one of the deceased examiners (Davis) "in particular to ask applicants if they had ever been arrested and to note the applicant's answer on his docket slip". There is nothing remotely approaching this in our case concerning either of the deceased examiners involved; indeed there is *nothing* about them except the facts of their former employment and their decease. Also, while the Court noted in *Cufari* that the Superior Court Justice who admitted the defendant to citizenship was also deceased (thereby indicating that it was deemed an open question whether the applicant might have been further interrogated at the actual court proceedings), and while the testimony in *Cufari* on custom and practice in fact even included an assertion by the District Director indicating that such questioning in court did customarily take place, in our case Mr. Dillon's testimony specifically negates any such possibility.

In each instance that we have found, except as noted in our next paragraph, the denaturalization case where testimony of custom and practice was allowed were ones where such was *accompanied by testimony from a living witness who participated in the examination*. *Chaunt* v. *United States*, 270 F. 2d 179 at 181-182 (C.A. 9), reversed on other grounds, 364 U. S. 350; *Stracher* v. *United States*, 258 F. 2d 112, 119-122 (C.A. 9 1958); *United States* v. *Galato*, 171 F. Supp. 169, 172 (M.D. Pa. 1959); *United States* v. *Failla*, 164 F. Supp. 307, 308-309 (D. N.J. 1958). Cf. *United States* v. *Profaci*, 274 F. 2d 289, 290-292 (C.A. 2 1960); *United States* v. *Ueki*, 158 F. Supp. 217, 219-220 (E.D. Mich. 1957).

affirmed 265 F. 2d 222 (C.A. 6 1959); *United States* v. *Minerich*, 250 F. 2d 721, 729-732 (C.A. 7 1957).

Plainly distinguishable is *United States* v. *De Lucia*, 256 F. 2d 487 (C.A. 7 1958), where the defendant's reliance on *Cufari* was rejected on the ground that the objection to custom and practice had been taken solely on the ground of materiality, not competency. Our objection at the trial herein was explicitly and repeatedly addressed to the issue of competency (*supra*).

Likewise plainly distinguishable is *United States* v. *Montalbano*, 236 F. 2d 757, 759 (C.A. 3 1956), affirming *United States* v. *Gignoresc*, 133 F. Supp. 820 (D. N. J. 1955), where, as shown by the District Court's opinion (133 F. Supp. at 822-824, 826-827), the handwriting of the deceased Examiners was positively identified by official colleagues who had known them well, and the Court went to meticulous pains to show that the entries of the deceased Examiners on the "Preliminary Form" were "patently made" by them.

Perhaps the most significant thing about the *Cufari* case, from the standpoint of the Government's attempted policy of resorting to "proof" of custom and practice in a proceeding like the instant one, is that the Government chose not to seek certiorari in *Cufari*. Nor has the *Cufari* decision ever been weakened, disparaged, or in any way unfavorably mentioned in any subsequent case, until this one. In short, but for the decision herein sought to be reviewed, *Cufari* must be taken as authoritatively stating the law on the point of the Government's right to resort to sole testimony of custom and practice in denaturalization proceedings involving alleged concealment of arrests. The conflict among Circuits here presented is therefore clear.

By way of further confirming the authoritativeness and vitality of the *Cufari* rule—until the decision below came

along—we note also that in all of the following cases—being the only ones we have found on the facet now to be mentioned—the Government's use of the "Preliminary Form" on the issue of concealment of arrests was accompanied by testimony of living witnesses who participated in the actual oral examination based on that form, and in none of those cases is there any suggestion that the Form in itself constituted independent evidence: *Chaunt* v. *United States*, *supra*; *Stacher* v. *United States*, *supra*; *United States* v. *Meli*, *supra*; *United States* v. *Galato*, *supra*; *United States* v. *Failla*, *supra*.

In its *brief after trial* (see *infra* as to our reason for these italics) in the Trial Court, and in the Court below, the Government attempted to distinguish *Cufari* on the basis of the narrow point to which we earlier alluded, namely, that the naturalization proceeding in *Cufari* took place in the year 1927, whereas subsequently (after July 1, 1929—as noted in the *Kessler* case cited in *Cufari*) there came into use for the first time the "Preliminary Form" with its question concerning arrests; and the Government's *post-trial* proposal herein for distinguishing the *Cufari* case in this respect also included the item that, from that same date in July 1929, there was in force for the first time a regulation of the Commissioner of Immigration and Naturalization reading as follows (the emphasis is the Government's):

> "Subdivision G.—Investigation of naturalization and citizenship matters.
>
> . . . . . .
>
> "Paragraph 2. Wherever practicable preliminary examinations of applicants for citizenship and their witnesses will be made in person. The principal purpose of such examinations is to obtain information bearing upon the applicant's admissibility to citizenship and the qualifications of the witnesses, rather than to obtain responses for record purposes. Both

> the applicant and the witnesses shall be carefully interrogated to determine whether the applicant has complied with the jurisdictional requirements of law, is mentally and morally qualified for citizenship, is attached to the principles of the Constitution, and is well disposed to the good order and happiness of the United States. *The question of possible arrests must be thoroughly covered. If the applicant has been arrested or charged with the violation of any law or ordinance, all the facts will be ascertained, including information as to whether conviction resulted.*" *

In its aforementioned *post-trial* briefs below the Government endeavored to create the impression that the above quoted 1929 regulation in some manner enjoyed the publicational aegis of the Federal Register or of the Code of Federal Regulations. It is true, as the Government there stated, that the 1929 provision above quoted had been carried over into Title 8, §70.7 of the 1938 edition of the Code of Federal Regulations. However, as is well known, the Federal Register was not in existence in 1929, or, indeed, in 1931 (the year of the operative happenings in this case).

The Government's reason, in its *post-trial* briefs below, for suggestibly endowing the 1929 regulation with Federal Register status was, of course, for the purpose of gaining the benefits of "judicial notice" of said 1929 regulation. Equally apparent was the Government's *reason for waiving* "judicial notice" of that 1929 regulation, inasmuch as the regulation had never been brought to the attention of the Trial Court during the trial, and the regulation did not in fact (as noted) enjoy Federal Register status. Assuming —which we by no means concede—that if the 1929 regulation is judicially noticeable this would have the effect of

* This "subdivision G" appears under "Rule 1" of the "Naturalization Rules and Regulations" [effective July 1, 1929] (Government Printing Office, 1929).

distinguishing the instant case from the *Cufari* case, the difficulty remains that such judicial notice would not suffice to resolve in the Government's favor the vital issue presented. And indeed, to apply the doctrine of judicial notice in these circumstances would raise the gravest issues of denial of fair trial to the within petitioner. It is exceedingly doubtful whether judicial notice applies to any and all federal regulations of pre-Federal Register vintage. The voluminous authorities which have discussed this question are collected in, *e.g.*, Gellhorn, *Administrative Law, Cases and Comments* (2d Ed.), pp. 136 *et seq.*; *Wigmore on Evidence* (3rd Ed.), 2572, at fn. 16.

Moreover, judicial notice of this pre-Federal Register 1929 regulation would have been one thing if the Government had sought such judicial notice during the actual trial: a problem of quite a different nature is presented when the Government seeks by a post-trial legal brief to introduce such a provision into the trial proofs for the first time *via* "judicial notice". The Government's sole witness as to the "custom and practice" which supposedly prevailed during the defendant's oral interviews with the Immigration Examiners on August 3, 1931, namely, Mr. Dillon, was closely cross-examined by the defense. Mr. Dillon made no mention of the 1929 regulation which the Government brought into the case for the first time after the trial was over; this, incidentally, suggests that Mr. Dillon's familiarity with or recollection of the "custom and practice" of thirty years ago may not be all that the Government hoped it was.

Had the Government attempted to introduce the 1929 regulation at the trial, *via* judicial notice or otherwise, this would have opened up an important avenue of additional cross-examination of Mr. Dillon with a view to ascertaining just how familiar he was with the regulation either now or contemporaneously (as of 1931), just how familiar

he knew other Immigration Officers to be with this regulation in 1931, and what if anything he knew as to the extent to which this 1929 regulation was being applied in 1931. All of this important avenue of cross-examination was completely lost to the defense by the Government's not having brought the 1929 regulation into the case until after the trial was concluded. And, all of this was completely ignored in the decision of the Court below (the Court of Appeals, Second Circuit). We are dealing here with an unusually heavy burden of proof upon the Government, be it remembered.

In any event, we submit that the broad policy lines along which the *Cufari* case, *supra*, is reasoned, and the way in which that decision has been applied and regarded in subsequent decisions heretofore set forth, favor the conclusion that the *Cufari* rule is as equally applicable to a case (like the instant one) whose operative happenings postdate the 1929 regulation, as it is to cases whose operative happenings preceded that regulation (of which *Cufari* is an example).

Finally, while one is on the subject of the 1929 regulations, it is appropriate to mention another provision of those regulations which the Government and both Courts below have apparently thus far overlooked. Rule 1, subdivision G, par. 3 of those regulations provides in part as follows:

> "All material statements of applicants for citizenship or applicants for certificates of citizenship and their witnesses should be in writing and under oath and signed by applicant or witness."

We mention this for its additional indication that we were correct in our suggestions, *supra*, that the "Preliminary Form", not being a writing under oath, is not in itself independently probative of concealment. In other words, if

the Commissioner of Immigration and Naturalization in the period of 1929 and closely following years wanted to lay down an explicit rule for the guidance of his officers in regard to the eliciting of "material" factual information from applicants for citizenship, he knew how to do so; and he did so, expressly, by the provision just quoted which requires that all such "material" statements be "in writing and under oath", etc.

Indeed, in view of this last quoted provision, it seems to us that a serious doubt is presented as to whether the oral interviews of August 3, 1931 which were had in this case are effective at all as a basis upon which the Government may mount a proceeding for revocation of citizenship on the ground of fraud as to a "material" fact.

3. The Court below seems to have conceded (Appendix hereto, *infra*, pp. 8a-10a) that this Court, in *Costello* v. *United States*, 365 U. S. 265, 282, has, at least provisionally, opened the door to the assertion of the defense of *laches* in denaturalization proceedings.

It was no secret to either the prosecutive or the judicial personages in the proceedings below that the petitioner John Oddo, or "Johnny Bath Beach", to use his much publicized newspaper appellation, has long been a target of sensationalistic "police" activity in the New York region. That the petitioner has for a long time been an object of interest to the federal police authorities—as an obvious by-product of these local sensations—need not be left merely to surmise. The Government conceded in open court in the instant trial that it began its naturalization investigation of the petitioner in December, 1952 (170a). One outcropping of that early investigation came before the Court below in *Application of Barnes*, 219 F. 2d 137 (C.A. 2, 1955), reversing *In re Oddo*, 117 F. Supp. 323 (E.D.N.Y., 1953). See also *United States* v. *Minker*, 350 U. S. 179.

Assuming—which we do not concede—that the Government was "justified" in not commencing its naturalization activities concerning the within petitioner even earlier than December, 1952, the fact remains that even as of the latter date Immigration Examiner Hardy was still alive; as earlier noted, that officer died in July, 1953. Examiner Hardy was one of the two persons who were in a position to give direct testimony as to what actually occurred at the oral interviews of the appellant on August 3, 1931 in connection with his application for citizenship.

On these facts, we submit, the case would appear to be a clear one satisfying both of the elements of laches mentioned by this Court in the *Costello* case, *supra*—the Government clearly did not move with diligence, and the petitioner was clearly prejudiced by the Government's laches, since, had the Government moved with proper dispatch even to carry forward its December, 1952, initial proceedings, Examiner Hardy would have been available for at least pretrial examination. Instead, the Government put off the filing of its complaint in the instant proceeding until June 21, 1957 (174a-177a).

It is therefore submitted that the Court below, in rejecting our argument of *laches* (Appendix hereto *infra* pp. 8a-10a) has made a serious misapplication of the innovational suggestions which this Court enunciated so recently in the *Costello* case, and that the importance of that innovation favors the exercise by this Court of a close and continuous monitoring of its aforesaid newly announced suggestion to ensure that the lower Federal Courts shall not, as has happened in this case, distort or disorient the *Costello* innovation during its earliest formative period of application in Federal denaturalization proceedings.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAURICE EDELBAUM
Attorney for Petitioner John Odell

Dated: May 23, 1963

APPENDIX "A"

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 205—October Term, 1962

(Argued January 21, 1963 Decided February 26, 1963)

Docket No. 27634

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN ODDO, also known as GIOVANNI ODDO, JOHN ADDO and as JOHNNY BATH BEACH,

Defendant-Appellant.

Before:

FRIENDLY, SMITH and MARSHALL, *Circuit Judges.*

Appeal from an order of the United States District Court for the Eastern District of New York, Bruchhausen, *J.*, revoking and setting aside the order admitting John Oddo, the appellant, to citizenship. 202 F. Supp. 899 (E. D. N. Y. 1962).

Affirmed.

Appendix "A"—Opinion of United States Court of Appeals

JEROME C. DITORE, Asst. United States Attorney (Joseph P. Hoey, United States Attorney for the Eastern District of New York, on the brief), *for Plaintiff-Appellee.*

MAURICE EDELBAUM, New York, N. Y., *for Defendant-Appellant.*

MARSHALL, *Circuit Judge.*

This is an appeal by John Oddo from a decree of the United States District Court for the Eastern District of New York, Bruchhausen, *J.*, which revoked and set aside the order admitting him to citizenship entered by that court on December 1, 1931. The decision is reported at 202 F. Supp. 899 (E. D. N. Y. 1962).

The Government brought this proceeding on June 21, 1957, pursuant to §340(a) of the Immigration and Nationality Act of 1952, which authorizes denaturalization when it appears that the certificate of naturalization was "procured by concealment of a material fact or by willful misrepresentation" 8 U. S. C. §1451(a). It was the Government's contention that during the course of his naturalization proceedings Oddo concealed a material fact in swearing under oath that he had never been arrested or charged with the violation of any law when, in fact, he knew that he had been arrested a number of times prior to the date of his naturalization. The District Court sustained this contention, holding that the Government had "clearly"

established that this defendant deliberately concealed his criminal record and thereby committed a fraud upon the Government which supports the revocation of citizenship" 202 F. Supp. at 900. We are asked to review that decision.

The right to acquire American citizenship is a precious one. Once acquired, the loss of citizenship can have severe and unsettling consequences. For this reason, the Government properly "carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship." *Costello* v. *United States*, 365 U. S. 265, 269 (1961). The evidence justifying divestment must be "clear, unequivocal and convincing" and not leave "the issue . . . in doubt." *Schneiderman* v. *United States*, 320 U. S. 118, 125, 158 (1943). See *Chaunt* v. *United States*, 364 U. S. 350 (1960); *Baumgartner* v. *United States*, 322 U. S. 665 (1944). A standard less exacting would be inconsistent with the importance of the right at stake. We have examined the District Court record in light of this standard. Because we have concluded that the Government adequately met its demanding burden of proof, the judgment below must be affirmed.

The appellant Oddo was born in Palermo, Italy, in 1903 and entered the United States in 1907. In 1926 he filed a Declaration of Intention, seeking American citizenship and on August 3, 1931, was examined orally by both a preliminary examiner and a designated examiner of the Immigration and Naturalization Service. His petition for naturalization was granted and appellant was naturalized on December 1, 1931.

Appendix "A"—Opinion of United States Court of Appeals

At the hearing in the District Court, the Government introduced evidence that Oddo had a record of arrests for the years immediately preceding his naturalization. The record included arrests upon charges of burglary in 1927, disorderly conduct in 1928 and 1929, homicide in 1930, vagrancy in 1931, assault and robbery in 1931, and violation of an illegal occupation statute in 1931. Oddo did not take the stand or offer any evidence of his own. He does not seriously dispute on appeal, as he could not, that the Government's evidence was sufficient to establish the existence of his arrest record. Nor does he dispute the general principle, as again he could not, that the failure to disclose a record of arrests during naturalization proceedings can constitute concealment of a material fact that will justify a decree of naturalization. *United States* v. *Montalbano*, 236 F. 2d 757 (3 Cir.), *cert. denied*, 352 U. S. 952 (1956); *Corrado* v. *United States*, 227 F. 2d 780 (6 Cir. 1955), *cert. denied*, 351 U. S. 925 (1956); *United States* v. *Accardo*, 113 F. Supp. 783 (D. C. N. J.), *affirmed per curiam*, 208 F. 2d 632 (3 Cir. 1953), *cert. denied*, 347 U. S. 952 (1954). What Oddo does dispute is the District Court's conclusion that the Government adequately proved the fact of concealment. We find this argument without merit.

The Government introduced into evidence the Application for a Certificate of Arrival and Preliminary Form for Petition for Citizenship which Oddo had completed and signed. In response to Question 29, which read, "Have you ever been arrested or charged with violation of any law of the United States, or any State, or any City ordinance or

traffic regulation?". Oddo answered "No". He made that statement and signed the form despite the fact that it contained the sentence, "I certify that all these statements made by me in this application and form are true to the best of my knowledge and belief." In the absence of an offer of any mitigating or explanatory evidence, the District Court was free to conclude that Oddo's act of signing his name to this form constituted concealment of the record of arrests which the Government had already proved.

To strengthen its case on the issue of concealment, the Government introduced evidence that Oddo twice denied under oath—when interviewed by the preliminary examiner and when interviewed by the designated examiner—that he had ever been arrested. Because both the preliminary examiner and the designated examiner were deceased, the Government relied upon the testimony of a former employee of the Immigration and Naturalization Service to establish the customary practices and procedures employed in 1931 at the office which processed Oddo's petition for naturalization. His testimony was that the existence of certain checkmarks and initials on Oddo's Preliminary Form indicated that both examiners, having placed Oddo under oath, had orally asked him each of the questions on the form, including Question 29, and had received the same answer as the one that he had given in writing. Testimony as to custom and practice is admissible as circumstantial evidence, subject to the usual condition that its probative value outweigh any possible prejudicial impact. *McCormick on Evidence* § 161 (1954); 1 *Wigmore on Evidence* §§ 92-93

(3d. ed. 1940). No error was committed in admitting the testimony in the present case.[1]

Appellant advances two arguments which seek to mitigate the significance of his failure to disclose his record of arrests. The first, based upon the *in banc* decision of the Court of Appeals for the Third Circuit in *United States v. Kessler*, 213 F. 2d 53 (3 Cir. 1954), is that the duty of an applicant for naturalization to disclose his record of arrests does not include an obligation to disclose "false arrests." Although the *Kessler* case so held, it did so in a factual situation importantly different from the present. The applicant in that case had been arrested seventeen times for obstructing the highway, a crime "unknown to the law of Pennsylvania," 213 F. 2d at 56, and had been discharged each time by the same magistrate who had each time informed her "that she had committed no crime cognizable at law." *Id* at 58. These circumstances were held to preclude a finding that the applicant had denied her record of arrests with knowledge that her denial was false and in a willful and deliberate attempt to deceive the Government. Assuming in appellant's favor that *Kessler* was correctly decided, Oddo's assertion that his arrests were either of a trivial nature or the result of arbitrary action by the

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[1] *Cufari v. United States*, 217 F. 2d 404 (1 Cir. 1954), much relied upon by appellant, is not to the contrary. The reliability and probative value of the evidence of interviewing custom and practice in that case was considerably less than that of the evidence in the present case since the printed Preliminary Form requiring written answers from the alien was not in use at the time and "inquiry about arrests in the course of the naturalization process was not required either by statute or departmental regulation." *Id.* at 409.

police does not bring him within its rationale; he has presented no evidence that he was arrested for crimes which do not exist.

Appellant's second argument, based upon *Chaunt v. United States*, 364 U. S. 350 (1960), is that the failure to disclose a record of arrests in naturalization proceedings is not by itself an automatic disqualification when an inquiry into the "totality of the circumstances surrounding the offenses charged makes them of extremely slight consequence," 364 U. S. at 354, so far as their materiality to any ground of disqualification is concerned. The applicant in *Chaunt* failed to disclose three arrests which had occurred ten to eleven years before he was naturalized. In commenting on this failure, the Court said:

> "Acquisition of American citizenship is a solemn affair. Full and truthful response to all relevant questions required by the naturalization procedure is, of course, to be exacted, and temporizing with the truth must be vigorously discouraged. Failure to give frank, honest, and unequivocal answers to the court when one seeks naturalization is a serious matter. Complete replies are essential so that the qualifications of the applicant or his lack of them may be ascertained. Suppressed or concealed facts, if known, might in and of themselves justify denial of citizenship. Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship." 364 U. S. at 352-53.

But the Court nevertheless refused on the facts before it to sanction denaturalization. It noted that the "arrests were made some years prior to the critical five-year period" during which the statute requires that the applicant behave

as a person of good moral character, and that they did not involve moral turpitude or fraudulent conduct, *id.* at 353; "had they involved conduct which even peripherally touched types of activity which might disqualify one from citizenship, a different case would be presented." *Id.* at 354. The facts in *Chaunt* are distinguishable from those in the present case. Although some of the arrests which Oddo was charged with concealing did not occur during "the critical five-year period," at least seven of them did. Moreover, Oddo's arrests involved charges, *e.g.*, homicide and assault and robbery, which cannot be deemed irrelevant to the statutory qualifications for citizenship.

Failure to disclose a record of prior arrests, even though none of those arrests by itself would be a sufficient ground for denial of naturalization, closes to the Government an avenue of enquiry which might conceivably lead to collateral information of greater relevance. *United States* v. *Montalbano*, 236 F. 2d 757 (3 Cir.), *cert. denied*, 352 U. S. 952 (1956); *Corrado* v. *United States*, 227 F. 2d 780 (6 Cir. 1955), *cert. denied*, 351 U. S. 925 (1956). As the Court said in *Chaunt*, "An arrest, though by no means probative of any guilt or wrongdoing, is sufficiently significant as an episode in a man's life that it may often be material at least to further enquiry." 364 U. S. at 354. Oddo denied the Government the opportunity to make that enquiry.

Finally, Oddo contends that the decision of the United States Supreme Court in *Costello* v. *United States*, 365 U. S. 265 (1961), "at least provisionally, opened the door to the assertion of the defense of laches in denaturalization proceedings" and that that defense should be deemed to bar the Government from prevailing in the present proceeding.

Appendix "A"—Opinion of United States Court of Appeals

The Court in *Costello* made reference to the traditional rule that laches is not a defense against the sovereign; it also noted that although no cases in the Supreme Court had specifically considered the question of the applicability of laches in a denaturalization proceeding, the lower federal courts had consistently held "that delay which might support a defense of laches in ordinary equitable proceedings between private litigants will not bar a denaturalization proceeding brought by the Government." *Id.* at 281. Nevertheless, the Court went on to "assume the applicability of laches" to the denaturalization proceeding before it and to hold on the merits that the defendant had failed to prove that he had been prejudiced in any relevant way by the Government's alleged lack of diligence in bringing the revocation proceeding. *Id.* at 282.

This disposition in *Costello* lends some support to Oddo's position; it is arguable that the case may be regarded as standing for the proposition that the Supreme Court has not foreclosed the possibility that laches may apply against the Government in a denaturalization proceeding. But it is well to remember, first, that *Costello* was premised on an argumentative assumption that was to be rejected on the facts, and, second, that "Congress has not enacted a time bar applicable to proceedings to revoke citizenship procured by fraud." 365 U. S. at 283. In the absence of a more forthright directive from either the Supreme Court or Congress and in the presence of the consistent current of federal court rulings to the contrary, *e.g.*, *United States* v. *Marino*, 27 F. Supp. 155 (S. D. N. Y. 1939); *United States* v. *Parisi*, 24 F. Supp. 414 (D. Md. 1938); *United States* v. *Ali*, 7 F. 2d 728 (E. D. Mich.

1925), the most favorable view that can be taken from appellant's standpoint is that the applicability of laches has not been foreclosed.

We do not feel the need to resolve that question here, however, because, as in *Costello*, even assuming the doctrine of laches to be applicable, Oddo cannot bring himself within its requirements. Those requirements are proof of lack of diligence by the party against whom the defense is asserted and prejudice to the party asserting the defense. The decision in *Costello* makes clear that the mere lapse of time, by itself, will not suffice to demonstrate the prejudice of which the doctrine speaks. To make operative the defense of laches, the lapse of time must bring with it actual and demonstrable prejudice. It is no more than speculation in the present case that the Government's delay adversely affected Oddo; the quality of the Government's proof of fraudulent concealment renders remote the possibility that Oddo could have rebutted it more effectively if required to do so at an earlier date, and Oddo offered no evidence of his own to substantiate such a possibility. Indeed, since the Government bore the burden of proof, the lapse of time may have been more prejudicial to its case than to Oddo's.

Affirmed.

APPENDIX "B"

Opinion

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
Civil Action No. 17757

[SAME TITLE]

March 6, 1962

Appearances:

JOSEPH P. HOEY, ESQ., United States Attorney, Eastern District of New York, Attorney for Plaintiff.

LAWRENCE J. GALARDI, ESQ., PETER H. RUVOLO, ESQ., Assistant U. S. Attorneys, Of Counsel.

MAURICE EDELBAUM, ESQ., for Defendant.

BRUCHHAUSEN, *C. J.*

In this proceeding, the plaintiff, the Government pursuant to statute seeks the cancellation of certificate of naturalization No. 3487544, issued to the defendant by this Court on December 1, 1931. The plaintiff alleges that the defendant had been arrested prior to his naturalization and that he, during the course of the naturalization proceedings, falsely denied and concealed that he had been arrested or charged with the violation of any law of the United States or of any State or of any City ordinance or traffic regulation.

The question is whether the United States of America sustained its burden in establishing that the defendant procured United States citizenship fraudulently and illegally.

The plaintiff's burden in this proceeding is a heavy one and can be sustained only if the record contains clear, un-

equivocal, and convincing evidence that fraud and illegality was committed by the defendant in procuring his citizenship. Schneiderman v. United States, 1943, 320 U. S. 118, 158, 63 S. Ct. 1333, 87 L. Ed. 1796; Baumgartner v. United States, 1944, 322 U. S. 665, 64 S. Ct. 1240, 88 L. Ed. 1525; United States v. Anastasio, 1955, 226 F. 2d 912, certiorari denied, 1956, 351 U. S. 931, 76 S. Ct. 787.

The record shows that on October 30, 1930, the defendant John Oddo completed an instrument which was his "Application For A Certificate of Arrival and Preliminary Form For Petition For Citizenship." It was signed by him and subsequently filed with the Immigration and Naturalization Service. It was received in evidence. Question No. 29 on that application which read, "Have you ever been arrested or charged with violation of any law of the United States, or any State, or any City ordinance or traffic regulation?" was answered in the negative by the defendant. Furthermore on four separate occasions during the naturalization proceeding the defendant denied any prior arrests.

At the trial, testimony of arresting officers together with official documents clearly identified the defendant as the person arrested. Identification was established through live testimony, official records of the New York City Police Department and memorandums of the police officers kept in the regular course of business. Special Agent Lyndon Shaneyfeld, a handwriting expert, testified that the signature of this defendant and the one of John Oddo referred to in several of the Government's exhibits are in his opinion those of the same individual. The evidence is overwhelming that this defendant and the John Oddo who was arrested

prior to December 1, 1931 are the same person. The arrests among others included vagrancy in January 1931, assault and robbery with a gun in August 1931, violation of 722:11 of the Penal Law in October 1931, homicide in July 1930, burglary in June 1927 and vagrancy in April 1923.

The Court has carefully analyzed the entire record and finds that the Government has adequately met the heavy burden imposed upon it. It is clearly established that this defendant deliberately concealed his criminal record and thereby committed a fraud upon the Government which supports the revocation of citizenship. United States v. Accardo, D. C. N. J., 113 F. Supp. 783, affirmed per curiam, 3 Cir., 208 F. 2d 632, certiorari denied, 1954, 347 U. S. 952, 74 S Ct. 677, 98 L. Ed. 1098; Corrado v. United States, 6 Cir., 1955, 227 F. 2d 780.

The defendant contends that the alleged concealment did not constitute "concealment of a material fact" and that he should have been permitted to explore the issue of "the totality of the circumstances" to establish that the arrest history was "of extremely slight consequences" in that the arrests were made on mere suspicion and speculation. He further claims that several of the arrests were of a picayune nature and that even if disclosed they would not have been a bar to citizenship. A like contention was clearly rejected in United States v. Genovese, 236 F. 2d 757, 759, certiorari denied 352 U. S. 952, wherein the Court held:

> "* * * The theory seems to be that one may deliberately engage in a falsehood concerning required facts during naturalization proceedings without fear of consequences so long as the truth, had it been revealed, would not have resulted in refusal of citizenship. The proposition has a built-in rebuttal.

Appendix "B"—Opinion of United States District Court

> Mere recital of it bares its absurdity. If the government thinks it important enough to ask a question which it has authority to ask, the answer cannot be considered immaterial and meaningless. That the answer may not lead to a refusal of citizenship is not the only consideration. The government is entitled to know all the facts which it requires."

Furthermore, the Court agreed with the decision in Corrado v. United States, 227 F. 2d 780. In that case the Court held at page 784:

> "Upon analysis, the issue is not whether naturalization would have been denied appellant had he revealed his numerous arrests, but whether, by his false answers, the Government was denied the opportunity of investigating the moral character of appellant and the facts relating to his eligibility for citizenship. How could any Government official or witness say whether or not citizenship would have been denied appellant from an investigation of the various causes of his arrest, when no opportunity for investigation was afforded? His false statement upon the material matter in actuality caused no investigation to be made. To be awarded citizenship in the United States exacts the highest standard of rectitude. Our Government should be afforded full opportunity for investigation of the moral character and fitness of an alien who seeks to be vested with all the rights, privileges and immunities of a natural born citizen of the United States. Where fraud has been practiced by the alien in procuring citizenship, it is not required that the Government in a denaturalization proceeding should meet the standard necessary for conviction in a criminal case. It will suffice to show that the applicant lied concerning a material fact which, if revealed, might have prevented his acquisition of citizenship."

Appendix "B"—Opinion of United States District Court

The defendant relies heavily upon United States v. Kessler, 3 Cir., 1954, 213 F. 2d 53. This case does not aid the defendant. Therein the Court concluded that there had not been an untruthful answer given to the question concerning arrests, and hence no fraud had been committed.

The defendant also stresses Cufari v. United States, 217 F. 2d 404 and Chaunt v. United States, 364 U. S. 350. These cases are distinguishable and have no bearing in this present case.

It is well settled that there is no time-bar, nor is laches a defense against the Government in instituting denaturalization proceedings.

The failure to disclose the arrests was a failure to perform a duty which the defendant owed to the Court. The Court because of non-disclosure granted the defendant his certificate of naturalization without investigating his criminal background. This non-disclosure was a fraud practiced upon the Court and the certificate so procured must be cancelled, and the prayer of the complaint is granted. The defendant's motions upon which decision was reserved, are denied.

Settle findings and decree on notice.

WALTER BRUCHHAUSEN,
Chief Judge.

APPENDIX "C"

Findings of Fact and Conclusions of Law

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff, United States of America, requests the Court to make Findings of Fact and Conclusions of Law in substance, as follows:

FINDINGS OF FACT

1. This action was brought pursuant to the provisions of Section 340(a) of the Immigration and Nationality Act of 1952 (8 U. S. C. A. 1451(a)), seeking the cancellation of Certificate of Naturalization No. 3487544 issued to defendant by this Court on December 1, 1931.

2. Prior to the institution of this action, an affidavit of a United States Naturalization Examiner, duly executed, showing good cause therefor, was delivered to the United States Attorney for the Eastern District of New York.

3. Defendant falsely denied and concealed his record of prior arrests on four separate occasions during the naturalization proceeding:

When he completed the "Application for a Certificate of Arrival and Preliminary Form for Petition for Citizenship";

When examined under oath by the Naturalization Examiner who was the preliminary examiner;

When examined under oath by the Naturalization Examiner who was the designated examiner;

When he appeared before this Court on December 1, 1931.

4. The arrests concealed by defendant included the following:

Violation of 722:11 of the Penal Law in October 1931
Assault and Robbery with a gun in August 1931
Vagrancy in January 1931
Homicide in July 1930
Burglary in June 1927
Vagrancy in April 1923

5. This Court granted defendant his Certificate of Naturalization without investigating his criminal background because of defendant's failure to disclose his prior arrest record during the course of his naturalization proceeding.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this subject matter and of the parties.

2. Good cause for the institution of this proceeding was shown prior to the commencement of this action.

3. Defendant's false denial and concealment of his prior arrest record constitutes concealment of a material fact.

4. Defendant's false denial and concealment of his prior arrest record during the course of the naturalization proceeding constituted a fraud upon this Court warranting cancellation of the Certificate of Naturalization so procured.

5. There is no time bar, nor is laches a defense against the Government in instituting denaturalization proceedings.

6. Decree should be entered for plaintiff on the merits.

So ordered:

Dated: Brooklyn, New York, March 26th, 1962.

/s/ WALTER BRUCHHAUSEN,
United States District Judge.

APPENDIX "D"

Decree

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
Civil Action No. 17757

[SAME TITLE]

The issues in this action having been regularly brought on for trial before Judge Walter Bruchhausen at a Term of this Court and the respective parties appearing by their attorneys, and the Court having heard the allegations and proofs of the parties, and after due deliberation having duly made and filed its decision herein in favor of the plaintiff against the defendant herein, and having filed a statement of facts found and conclusions of law thereon and directing judgment as hereinafter stated,

Now, on motion of Joseph P. Hoey, United States Attorney for the Eastern District of New York, attorney for the plaintiff, it is

DECREED, that the order of this Court entered on the 1st day of December, 1937, purporting to admit the defendant, John Oddo, to United States citizenship be, and the same, hereby is revoked and set aside; and it is further

DECREED, that the Certificate of Naturalization bearing No. 3487544 (Petition No. 157572) issued to the defendant, John Oddo, on the 1st day of December, 1931 be, and the same hereby is cancelled and set aside; and it is further

DECREED, that the defendant, John Oddo, shall surrender said Certificate of Naturalization bearing No. 3487544 to

the Clerk of this Court whereupon it shall be marked "Cancelled"; and it is further

DECREED, that the defendant, John Oddo, is not and never was a duly naturalized citizen of the United States, and is not entitled to any of the rights, privileges, benefits or advantages of such citizenship; and it is further

DECREED, that the Clerk of this Court transmit a certified copy of this judgment, together with the aforesaid Certificate of Naturalization to the Attorney General at Washington, D. C.; and it is further

DECREED, that the Clerk of this Court be and is hereby directed to retain for filing in the Naturalization Room, a certified copy of this judgment; and it is further

DECREED, that the Clerk of this Court be, and hereby is directed to enter this judgment of record, and to cancel and set aside the aforesaid Certificate of Naturalization, and to notify the Attorney General at Washington, D. C. of said entry and cancellation; and it is further

DECREED, that the plaintiff, United States of America, recover costs against defendant, John Oddo, as taxed in the sum of $130.80.

Dated: Brooklyn, New York,
April 9th, 1962.

S/ WALTER BRUCHHAUSEN,
United States District Judge

APPENDIX "E"

Judgment of United States Court of Appeals, Second Circuit

(204a) UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of February one thousand nine hundred and sixty-three.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN ODDO, also known as GIOVANNI ODDO, JOHN ADDO and as "JOHNNY BATH BEACH",

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

Appendix "E"—Judgment of United States Court of Appeals, Second Circuit

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

(205a) UNITED STATES COURT OF APPEALS
Second Circuit

Filed February 26, 1968

A. Daniel Fusaro
Clerk